IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Case No. 999-cv-99999-MSK-XXX

JANE ROE,

Plaintiff,

v.

SMITH CORP., and
JACK SMITH,

Defendants.

SAMPLE SUMMARY JUDGMENT MOTION[1]

COME NOW Defendants Smith Corp. and Jack Smith, who move for summary judgment on all of the claims in the Complaint **(# XX)** pursuant to Fed. R. Civ. P. 56.

Defense counsel discussed the grounds for this motion and the relief requested with counsel for the Plaintiff on February 30, 2999. Plaintiff's counsel opposes the relief requested herein.[2]

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[1]*This document provides a sample of a motion for summary judgment that sufficiently complies with the requirements of Practice Standard V.H.3.b of Judge Krieger. Notwithstanding D.C. Colo. L. Civ. R. 56.1(A), because there is minimal legal argument necessary with regard to the issues presented in this example, a separate brief would be unnecessary. To the extent that the resolution of particular issues requires more detailed legal analysis, a separate brief addressing <u>legal</u> issues may be filed, but such brief should be limited to the legal analysis, and should not repeat factual assertions presented in this motion.*

[2]*Although compliance with Local Rule 7.1(A) is not required before filing a Rule 56 motion, the Court nevertheless encourages counsel to confer and discuss not only the relief requested, but the arguments to be presented in the motion. Doing so may lessen or avoid entirely the need for judicial intervention.*

CLAIMS AND DEFENSES UPON WHICH JUDGMENT IS SOUGHT[3]

A. Defendants are entitled to Summary Judgment on Claim 1: Sex Discrimination

1. Burden of proof and elements

The Plaintiff's claim of sex discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq*., requires the Plaintiff to establish, by a preponderance of the evidence, a *prima facie* case that: (i) she is female; (ii) she was qualified for the position she held; (iii) she suffered an adverse employment action; and (iv) that adverse action occurred in circumstances giving rise to an inference of discrimination. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506 (1993). The Defendants do not challenge any elements beyond the Plaintiff's ability to state a *prima facie* case, and thus, do no address the remaining elements of this claim.

2. Elements that cannot be proven by the Plaintiff

Element 3: The Defendants contend that the Plaintiff cannot demonstrate a triable issue of fact as to whether she suffered an adverse employment action.[4]

A. The Plaintiff testified that she considered the following three events to have been discriminatory: (i) Defendant Smith accused her of being a "thief" in a disciplinary hearing on November 4, 2999, *Plaintiff's Deposition*, attached hereto as Exhibit A, at 55; (ii) Plaintiff's supervisor Jones verbally disciplined her for coming in late, Exhibit A at 59; and (iii) Plaintiff was

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[3]*Note that a separate statement or summary of the facts is not necessary, nor is a recitation of the summary judgment standard. However, parties are encouraged to review the Court's decision in* In re Riobzyme Pharmaceuticals, Inc. Securities Litigation, *208 F.Supp.2d 1106 (D. Colo. 2002) for an extended discussion of the standards applicable to summary judgment motions.*

[4]*In this example, because the movant does not bear the burden of proof on this claim at trial, it need only identify those elements it contends the non-movant cannot prove. Thus, this sentence alone is sufficient, and no further factual discussion is necessary by the movant. To the extent that the movant prefers to anticipate the non-movant's factual response (and perhaps avoid the need to file a reply brief), any factual discussion should be in the following form.*

"terminated," Exhibit A at 71. The Plaintiff testified that she "can't think of anything else" that she claims is discriminatory. Exhibit A at 77.

B. For purposes of this motion, the Defendants will accept the Plaintiff's factual claim that Defendant Smith called her a thief. However, this isolated incident does not constitute an adverse employment action. *See Aquilino v. Univ. of Kansas*, 268 F3d 930, 934 (10th Cir. 2001). It is undisputed that the Plaintiff was never actually disciplined based on Defendant Smith's accusation. Exhibit A at 89; *Deposition of Jack Smith*, attached hereto as Exhibit B, at 19.

C. Supervisor Jones denies ever having disciplined the Plaintiff for being late. *Deposition of Supervisor Jones*, attached hereto as Exhibit C, at 42. On occasion, he threatened to "write her up" for being late, Exhibit C at 106, 118, but the Plaintiff's personnel record does not reflect any discipline for tardiness. *Affidavit of Human Resource Manager Doe*, attached hereto as Exhibit D, at ¶ 4. Other than insisting that she was disciplined, the Plaintiff cannot recall any specifics of the incident. Exhibit A at 61.

D. The Plaintiff tendered a letter of resignation on November 21, 2999. Exhibit D at ¶ 8; *Resignation Letter*, attached hereto as Exhibit E. In that letter, she states that she is resigning "to seek job opportunities closer to my interests." Exhibit E. Thus, she was not terminated, but resigned voluntarily.

Element 4: The Plaintiff cannot establish that any adverse employment action arose in circumstances giving rise to an inference of discrimination.

A. The Plaintiff admits that Supervisor Jones threatened to discipline male employees who were late for work. Exhibit A at 62.

B. Although Defendant Smith denies the Plaintiff's contention that he stated "girls

aren't cut out for this kind of work," for purposes of this motion, the Defendants assume the Plaintiff is correct. The Plaintiff admits that Defendant Smith also referred to male employees as "boys" and said that "the boys down there just can't figure it out." Exhibit A at 101. These comments do not support an inference that Defendant Smith's conduct was a result of discrimination.

B. Defendants are entitled to Summary Judgment on Claim 2: Defamation

1. Burden of proof and elements: To state a claim for defamation under Colorado law, a plaintiff must allege: (i) a defamatory statement; (ii) published to a third party; (iii) the existence of special damages or actionability absent special damages; and (iv) actual malice. *Card v. Blakeslee*, 937 P.2d 846, 850 (Colo. App. 1996); *Barnett v. Denver Publishing Co.*, 36 P.3d 145, 147 (Colo. App. 2001). The Plaintiff has the burden of proof by clear and convincing evidence. *Barnett, id.*

2. Elements that cannot be proven by the Plaintiff

Element 2: Defendant Smith's statement that the Plaintiff was a "thief" was not published to a third party.

A. The statement was made in a disciplinary hearing. Ex. A at 68. The only people present were the Plaintiff, Defendant Smith, and Ms. Doe, the Defendants' Human Resources Manager. Ex. A at 68-69; Ex. B at 44; Ex. D at ¶ 6.

B. As a matter of law, Ms. Doe is in privity with Defendant Smith Corp., and is not a third-party for purposes of publication. *Johnson v. Made-Up Case*, 000 P.2d 999 (Colo. 2000).

C. Although the Plaintiff contends other employees could have overheard the comment through the open office door, she cannot identify any employee who did, in fact,

overhear the statement. Ex. A at 71.

Element 3: The Plaintiff cannot show special damages or that the comment was *per se* defamatory.

A. To be *per se* defamatory, the statement must allege a criminal offense. *Gordon v. Boyles*, 99 P3d 75, 79 (Colo. App. 2004). Defendant Smith's statement accused the Plaintiff of being a "thief" with regard to entries on her timecard. Ex. A at 88; Ex. B at 56. In essence, Defendant Smith accused the Plaintiff of "theft of time," not a criminal offense.

B. Special damages must be specific monetary losses resulting from the alleged defamatory statement. *Lind v. OReilly*, 636 P.2d 1319, 1321 (Colo. App. 1981). The Plaintiff cannot identify any special damages she sustained. Ex. A at 89-90.

Element 4: The Plaintiff cannot show actual malice.

A. "Actual malice" requires proof that the statement was made with knowledge of its falsity or with reckless disregard as to its truth. *Wilson v. Meyer*, ___ P.3d ___, 2005 WL 2046224 (Colo. App. 2005).

B. Defendant Smith compared the Plaintiff's timecard entries with the recollection of the Plaintiff's supervisor as to her arrival time. Ex. B at 75. He believed in good faith and upon reasonable investigation that the Plaintiff's timecard was fraudulently endorsed. Ex. B. at 76.

C. Defendants are entitled to summary judgment on their affirmative defense of statute of limitations regarding Claim 2, Defamation

1. Burden of proof and elements:

The Defendants bear the burden of establishing the affirmative defense of statute of limitations. This defense has one element: that the Plaintiff's action was not commenced within

one year of the defamatory statement. C.R.S. § 13-80-103(1)(a).

2. The undisputed facts show the Complaint is untimely[5]

A. Defendant Smith's allegedly defamatory statement was made at the disciplinary meeting of July 10, 2003. Ex. A at 63.

B. The Plaintiff commenced this action by filing a Complaint on July 19, 2004. *Docket* # **XY**.

C. Therefore, the undisputed facts establish that the defamation claim is untimely.

CONCLUSION

Because the Plaintiff's evidence, viewed in the light most favorable to her, is insufficient to establish all of the elements of her claims, the Defendants are entitled to summary judgment on both claims. In addition, the undisputed evidence indicates that the Defendants have proven their affirmative defense of statute of limitations on the Second Cause of Action, entitling them to summary judgment on that defense.

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[5]*Note carefully the difference between the format to be used by a movant who does not bear the burden of proof on an issue, and the format to be used where the movant bears the burden of proof at trial. In the latter case, the movant must point to sufficient, undisputed evidence to establish every element of the claim or defense. In response, the non-movant must point to evidence indicating the existence of a genuine issue of fact with regard to one or more elements of the claim or defense.*

IN THE UNITED STATES DISTRICT COURT
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JANE ROE,

Plaintiff,

v.

SMITH CORP., and
JACK SMITH,

Defendants.

SAMPLE SUMMARY JUDGMENT RESPONSE

COMES NOW Plaintiff Jane Roe, in opposition to the Defendants' Motion for Summary Judgment **(# XY)** pursuant to Fed. R. Civ. P. 56. Triable issues of fact exist with regard to both claims upon which the Defendants seek summary judgment.

CLAIMS AND DEFENSES UPON WHICH JUDGMENT IS SOUGHT[6]

A. Claim 1: Sex Discrimination

1. Burden of proof and elements

The Plaintiff agrees with the Defendants' recitation of the burden of proof and elements on this claim.

2. Elements challenged by the Defendants

Element 3: The Plaintiff can demonstrate a triable issue of fact as to whether she suffered an adverse employment action.

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[6]*Note that, once again, separate statement or narrative summary of the facts is not necessary.*

A. The Plaintiff agrees that the three adverse actions discussed by the Defendant are the only actions at issue in this claim.

B. The standard for "adverse action" in the 10th Circuit is to be "liberally construed." *Heno v. Sprint/United Mgmt*. Co. 208 F.3d 847, 857 (10th Cir. 2000). Actions which pose no immediate consequence but potentially harm future employment prospects may be adverse actions. *Burlington Industries Inc. v. Ellereth*, 524 U.S. 742, 761 (1998).

C. Defendant Smith's accusation that the Plaintiff was a "thief" constitutes an adverse action. After calling the Plaintiff a "thief," Defendant Smith stated that "we can't have people like that working here." Ex. A. at 103. The Plaintiff interpreted this statement as effectively terminating the Plaintiff's employment. Ex. A at 105. Human Resources Manager Doe told the Plaintiff after the meeting, that "[Defendant Smith] pretty much thinks you should look for a job elsewhere." Ex. A at 109.

D. Although Supervisor Jones never formally disciplined the Plaintiff, Defendant Smith clearly incorporated Jones' "warnings" to the Plaintiff in his decision to terminate her. Defendant Smith told the Plaintiff "This isn't the first problem we've had with your attendance. Jones has talked to you about it many times." Ex. A at 92. Tardiness is an offense warranting progressive discipline, including oral and written warnings, before termination may result. *Employee Handbook*, attached hereto as Exhibit F,[7] at 7. Thus, Defendant Smith essentially concedes that Jones' warnings had the same effect as formal discipline.

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[7]*The suggested scheme for identification of exhibits in D.C. Colo. L. Civ. R. 56.1(C)(1) shall not be followed. For ease of review, it is encouraged that the responding party designate new exhibits by continuing the scheme used by the movant, or, if necessary, begin an entirely new scheme (i.e. using letters if the movant has used numbers). Schemes that result in multiple documents bearing the similar exhibit designations (e.g. "Defendants' Exhibit A" and "Plaintiff's Exhibit A") shall not be used.*

E. The Plaintiff "resigned" only in response to Defendant Smith implying that she was going to be terminated. Ex. A at 109. Human Resources Manager Doe confirmed that the Plaintiff was essentially told to look for another job. *Id.* The Plaintiff's resignation was by no means voluntary. Her "resignation" letter was carefully-worded out of fear that a less-diplomatic tone would result in adverse employment references by Defendant Smith. Ex. A at 111.

Element 4: The Plaintiff can establish that these adverse actions arose in circumstances giving rise to an inference of discrimination.

A. "Circumstances giving rise to an inference of discrimination" may arise in many contexts. For example, the Plaintiff may show actions or remarks by decisionmakers reflecting discriminatory animus, preferential treatment given to employees outside the protected class, or questionable timing of an employment decision. *Plotke v. White*, 405 F.3d 1092, 1101 (10th Cir. 2005).

B. Defendant Smith admits, at least for purposes of this motion, the Plaintiff's contention that he stated "girls aren't cut out for this kind of work." *See Defendant's Motion* at 3-4. This clearly discriminatory remark alone is sufficient to raise an issue of fact as to Defendant Smith's motivation.

C. The Defendants cannot identify a single male employee terminated for tardiness. Ex. B at 88. The Plaintiff has identified several males in her department that have been as late to work as she, if not more so. Ex. A at 51-53.

B. Claim 2: Defamation

1. Burden of proof and elements

The Plaintiff disputes the Defendants' statement of the burden of proof and elements on this claim. Specifically, the Plaintiff denies that she is required to prove this claim by clear and

convincing evidence. That standard applies only to claims by public figures. *Barnett v. Denver Publishing Co.*, 36 P.3d 145, 147 (Colo. App. 2001). The Plaintiff also denies that she is required to prove actual malice. That element is only required in claims brought by public figures. *Barnett, id.*

2. Elements challenged by Defendants

Element 2: Defendant Smith's statement that the Plaintiff was a "thief" was published to a third party.

A. The Plaintiff contends that Defendant Smith's statement was published to third parties, including employee Mary Clark. In August 2003, Clark stated to Plaintiff "Word from the office is that [Defendant Smith] is looking for you. Are you a thief, Jane? Did you steal something from the company or something? What is this all about?" Ex. A at 58. Clark's use of the word "thief" clearly indicates that Defendant's Smith's statement was published to persons not involved in the disciplinary meeting. Whether Clark overheard Defendant Smith using the word at the meeting, or whether he or some other agent of the company repeated the statement later is of no consequence, as it was undisputedly published by someone within the Defendants' control.

Element 3: The Plaintiff can show special damages or that the comment was *per se* defamatory.

A. By accusing the Plaintiff of theft, a criminal offense, Defendant Smith's statement was *per se* defamatory. *Gordon v. Boyles*, 99 P.3d 75, 79 (Colo. App. 2004). Defendants' distinction between tangible "theft" and "theft of time" is of no consequence. Defendant cites no caselaw supporting this alleged distinction.

B. In the alternative, Defendant Smith's statement is defamation *per se*, as it harms the Plaintiff in her trade or profession. *Id.* The statement accuses the Plaintiff of being an

untrustworthy employee.

Element 4: The Plaintiff can show actual malice.

A. "Actual malice" is not an element of a claim against a private party. *Barnett, supra.*

B. Assuming actual malice is a necessary element, Defendant Smith knew that his accusation of theft was untrue, or, at the least, reckless. At the disciplinary meeting, the Plaintiff informed Defendant Smith that somebody else wrote the false entry on her timecard. Ex. A at 79; Ex. B at 63. Defendant Smith did not investigate this contention before calling the Plaintiff a thief. Ex. B at 70.

C. Defendants are not entitled to summary judgment on their affirmative defense of statute of limitations.

1. Burden of Proof and Elements

The Plaintiff does not dispute the Defendants' statement of the burden of proof and elements applicable to this defense.

2. Elements that cannot be established by Defendant

Element 1: The claim was commenced within one year of accrual

A. A claim of defamation accrues when the Plaintiff has knowledge of all of the necessary elements, including publication. *Taylor v. Goldsmith*, 870 P.2d 1264, 1265-66 (Colo. App. 1994).

B. The Plaintiff first learned that Defendant Smith (or his agents) had published his defamatory statement about the Plaintiff in August 2003, when the Plaintiff spoke to Clark. Ex. A at 109. The Defendants have not pointed to facts warranting an earlier accrual date. Therefore, the Plaintiff's claim did not accrue until August 2003, and the Complaint, filed in July 2004, was

timely.

CONCLUSION

For the foregoing reasons, the Plaintiff has come forward with sufficient evidence, taken in the light most favorable to her, to establish all of the challenged elements of her claims, and the Defendants' request for summary judgment on those claims should be denied. A genuine issue of fact exists as to the sufficiency of the Defendants' affirmative defense of statute of limitations, and thus, summary judgment on that defense should be denied.